

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROY B. DAVIS, <sup>1</sup>	§	
	§	No. 574, 2008
Petitioner Below,	§	
Appellant,	§	Court Below—Family Court of
	§	the State of Delaware in and for
v.	§	Sussex County
	§	
JAN E. DAVIS,	§	File No. CS-01-03138
	§	Pet. Nos. 07-18412, 07-41026
Respondent Below,	§	and 08-29916
Appellee.	§	

Submitted: February 9, 2009

Decided: March 17, 2009

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 17<sup>th</sup> day of March 2009, having considered the appellee's motion to dismiss filed on January 26, 2009, the appellant's response in opposition to the motion, and the Family Court record, it appears to the Court that:

(1) On November 21, 2008, the appellant, Roy B. Davis ("Father"), filed an appeal from the Family Court's decision of October 24, 2008 that decided cross petitions for modification of custody and a petition for a rule to show cause.<sup>2</sup> In her motion to dismiss filed on January 26, 2009, the appellee, Jan E. Davis

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<sup>1</sup> By Order dated November 21, 2008 the Court assigned pseudonyms to the parties. Del. Supr. Ct. R. 7(d).

<sup>2</sup> The Family Court awarded the parties joint custody with shared placement and denied the petition for a rule to show cause.

(“Mother”), argues that the Family Court’s October 24, 2008 decision was not final and appealable because it did not address her prior requests for attorney’s fees.

(2) The record reflects that both parties filed requests for attorney’s fees during the course of the proceedings that led to the Family Court’s decision of October 24, 2008. As to those applications, it appears that the Family Court denied relief, indicating that it would address the issue of fees “at the custody hearing,”<sup>3</sup> which was held on October 23 and 24, 2008, or “at the conclusion of this case.”<sup>4</sup>

(3) It appears that the issue of attorney’s fees was not addressed during the custody hearing and/or in the Family Court’s October 24, 2008 decision from which Father filed his appeal. Therefore, it appears that the Family Court’s October 24, 2008 order was not a final order because it did not finally determine and terminate all of the issues before the Family Court.<sup>5</sup>

(4) On February 20, 2009, Mother filed a second motion to dismiss. Mother argued that the appeal is moot due to a Commissioner’s order of February 13, 2009, that transferred temporary residential placement of the child to Mother pending a hearing on a motion for modification of custody that Mother filed on or

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<sup>3</sup> *Davis v. Davis*, File No. CS01-03138, Pet. No. 07-18412 (Del. Fam. Sept. 3, 2008).

<sup>4</sup> *Davis v. Davis*, File No. CS01-03138, Pet. No. 07-18412, (Del. Fam. April 22, 2008).

<sup>5</sup> “[T]he test of the appealability of an order is not whether the order itself is a final order but whether the order sought to be appealed constitutes a final judgment determining on the merits the entire controversy between the parties and which ‘leaves nothing for future determination or consideration.’” *O’Brien v. O’Brien*, 1987 WL 36718 (Del. Supr.) (quoting *Showell Poultry, Inc. v. Delmarva Poultry Corp.*, 146 A.2d 794, 795 (Del. 1958)).

about January 26, 2009. In view of the dismissal of the appeal as interlocutory, the Court need not reach the issue raised in Mother's second motion to dismiss.

NOW, THEREFORE, IT IS ORDERED that Mother's motion to dismiss filed on January 26, 2009 is GRANTED, and this appeal is DISMISSED pursuant to Supreme Court Rule 29(b). Mother's request for attorney's fees in connection with the appeal is DENIED.

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice